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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHOLEM PERL et al., Plaintiffs and Appellants, v. BANK OF AMERICA N.A. et al., Defendants and Respondents.	B278356 Los Angeles County Super. Ct. No. BC505883

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly Kendig, Judge. Reversed with directions.

Law Offices of Mark E. Goodfriend and Mark E. Goodfriend for Plaintiffs and Appellants.

McGuireWoods, Leslie M. Werlin, and Adam F. Summerfield for Defendants and Respondents.

Plaintiffs sued Defendants Bank of America, Recontrust Company, and U.S. Bank, alleging Defendants sold Plaintiffs' home at a trustee's sale in violation of an agreement not to foreclose on the property while Defendants considered Plaintiffs' application for a loan modification. The trial court sustained Defendants' demurrer to Plaintiffs' claim that the conduct violated the Homeowner Bill of Rights (Civ. Code, § 2923.4 et seq., the HBOR), without leave to amend, and granted Defendants' motion for judgment on the pleadings as to Plaintiffs' promissory estoppel claim.[1] We conclude Plaintiffs alleged sufficient facts to state a claim for promissory estoppel, and find Plaintiffs have demonstrated they can amend the complaint to state a claim for dual tracking in violation of the HBOR. We therefore reverse the judgment, vacate the order dismissing the promissory estoppel claim, and direct the trial court to grant Plaintiffs leave to amend the complaint to state a claim for violation of the HBOR.

FACTS AND PROCEDURAL BACKGROUND

Consistent with the applicable standard of review, we draw our statement of facts from the allegations of Plaintiffs' operative first amended complaint and other matters properly subject to judicial notice. (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 764 (*Orange Unified*); *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885*; Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-266.) "[W]e treat as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law."

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[1] Statutory references are to the Civil Code, unless otherwise indicated.

(*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3; *Fontenot*, at pp. 264-266.)

In 2005, Plaintiffs obtained a $1,300,000 refinance loan, secured by a deed of trust on their residence. In 2009, Plaintiffs fell behind on their mortgage payments. After Defendants recorded a notice of default on the property, Plaintiffs contacted Defendants about obtaining a loan modification to avoid foreclosure. On January 23, 2013, Defendants recorded a notice of sale on the property, setting a trustee's sale for March 20, 2013.

On March 12, 2013, Plaintiffs submitted a loan modification application to Defendants. Defendants confirmed the application appeared to be complete and advised Plaintiffs that the foreclosure proceedings would be suspended while the application was under review. If Defendants determined Plaintiffs were not eligible for a modification, they also promised to give Plaintiffs reasonable advance notice before resuming the foreclosure.

On March 20, 2013, Defendants conducted the noticed trustee's sale. Eden Place, LLC, purchased the property for $1,391,000.

Plaintiffs' original complaint asserted five causes of action, including claims for breach of contract and violation of the HBOR. Defendants filed a demurrer to the complaint, which the trial court sustained. With respect to breach of contract, the court concluded the statute of frauds barred Plaintiffs from maintaining a claim based on Defendants' alleged oral agreement to suspend the foreclosure. As for the HBOR violation, the court found Plaintiffs had alleged little more than a "legal conclusion" in support of the claim. The court granted leave to amend to

state a claim for promissory estoppel, as outlined in *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218 (*Aceves*), and denied leave to amend the other claims.[2]

Plaintiffs filed an amended complaint asserting a single cause of action for breach of contract "based upon promissory and/or equitable estoppel." As in their original complaint, Plaintiffs alleged Defendants made the following representations orally and in writing: (1) Plaintiffs' loan modification package appeared complete and Defendants did not currently require additional paperwork from Plaintiffs; (2) Defendants would review Plaintiffs' application and grant Plaintiffs a loan modification if it met Defendants' criteria or Defendants would advise Plaintiffs if they required additional documentation or information; (3) a new bank representative would be assigned to handle Plaintiffs' application; (4) the foreclosure process would be suspended and no trustee's sale would take place while Plaintiffs were under consideration for a modification; and (5) if Plaintiffs' application were rejected, Defendants would not resume the foreclosure process without giving Plaintiffs reasonable advance notice.

As for detrimental reliance, the amended complaint alleged that, but for Defendants' promises, Plaintiffs would have "actually and successfully stopped [the trustee] sale from going forward" by (1) filing a bankruptcy petition; (2) filing a lawsuit and application for a temporary restraining order; and/or (3) submitting any additional information or documents required

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[2] The statute of frauds will not defeat a breach of contract claim premised on promissory estoppel. (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1040, fn. 10 (*Garcia*).)

for the loan modification to suspend the foreclosure process. Plaintiffs alleged they would have qualified for a loan modification had Defendants fulfilled their promises, or they would have been able to "borrow from family members, friends and/or business associates" enough money to pay the amounts in arrears. As a result of Defendants' breach, Plaintiffs alleged damages in excess of $250,000.

After answering the amended complaint, Defendants moved for judgment on the pleadings.

The court granted Defendants' motion, without leave to amend, concluding Plaintiffs' amended pleadings were "vastly distinguishable from the *Aceves* case." With respect to the reliance element of their promissory estoppel claim, the court reasoned that Plaintiffs had "fail[ed] to explain how they can allege facts showing their [forgone] bankruptcy or lawsuit was reasonably foreseeable to defendants in light of no allegation showing defendants promised to [forbear] foreclosure if plaintiffs declined to file for bankruptcy or a lawsuit, or that the bankruptcy or lawsuit would have been successful." As for Defendants' alleged promises, the court likewise found them "vastly different from those in the *Aceves* case," explaining the promises "do not obligate the bank to do anything other than to consider the plaintiffs' application for loan modification, and not to foreclose while the modification application is under consideration." All the promises, the court concluded, were "in the conditional, and essentially promise nothing except to consider the application, and merely set forth the procedures for reviewing the application for a loan modification." Finally, the court noted that there were "three banking institutions involved

in this transaction, [but] the allegations do not specify which defendant did what."

Upon entry of judgment, Plaintiffs filed a motion for reconsideration, attaching a proposed second amended complaint. The proposed amended pleading added allegations naming the Bank of America representative who made the alleged promises, and elaborated on the actions Plaintiffs declined to take to prevent foreclosure in reliance upon Defendants' promises.

The trial court denied the motion for reconsideration, concluding the motion was not based upon new or different facts and the new allegations were insufficient to cure the defects in Plaintiffs' complaint. Defendants gave notice of entry of judgment, and this timely appeal followed.

DISCUSSION

1. *Standard of Review*

On appeal from a judgment on the pleadings, "the standard of review is the same as for a judgment of dismissal following the sustaining of a general demurrer." (*Orange Unified, supra,* 54 Cal.App.4th at p. 764.) "[W]e review the complaint de novo to determine whether it alleges facts stating a cause of action on any possible legal theory. [Citation.] ' " 'We treat the [motion] as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " [Citations.]' [Citation.] 'Further, "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." ' " (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490.)

When the trial court denies leave to amend, "we also must decide whether there is a reasonable possibility that the defect can be cured by amendment." (*Koszdin v. State Comp. Ins. Fund*

(2010) 186 Cal.App.4th 480, 487.) "The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' " (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) The requisite showing can be made for the first time on appeal, as the "issue of leave to amend is always open on appeal, even if not raised by the plaintiff." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.)

2. *Promissory Estoppel*

" 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." ' " (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672 (*Advanced Choices*); *Aceves, supra,* 192 Cal.App.4th at p. 225.)

a. *Clear and unambiguous promise*

" '[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . .' [Citation.] The promise must, in addition, be 'clear and unambiguous in its terms.' " (*Garcia, supra,* 183 Cal.App.4th at p. 1044.) "To be enforceable, a promise need only be ' "definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational

basis for the assessment of damages." ' [Citation.] It is only where ' "a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, [that] there is no contract." ' " (*Id.* at p. 1045.) "[T]he fact that a promise is conditional does not render it unenforceable or ambiguous." (*Ibid.*; *Aceves, supra,* 192 Cal.App.4th at p. 226.)

Plaintiffs' promissory estoppel claim is based principally upon Defendants' alleged promise to "suspend[ ]" the "foreclosure process" and refrain from a "trustee's sale . . . while [Plaintiffs'] loan was being reviewed for a loan modification." In connection with that review, Defendants also allegedly promised that "[i]f Plaintiffs' request for a loan modification were to be rejected or no longer under consideration, the foreclosure process would not be resumed or a trustee's sale scheduled or held without reasonable advance notice to Plaintiffs that foreclosure proceedings were being resumed and that a new sale date had been scheduled."

The trial court found these alleged promises inadequate to support a promissory estoppel claim, reasoning the promises were "vastly different from those in the *Aceves* case." Specifically, the court objected that the promises were "all in the conditional," essentially promising "nothing except to consider the application," while the defendants in *Aceves* had "promised to modify the loan explicitly in exchange for [forgoing] an already-filed bankruptcy." Defendants advance basically the same objection on appeal, arguing the *Aceves* holding extends only to "a borrower who is in bankruptcy, who has the protection of the automatic stay, and who is lured out [of] that protected status by

a promise from her lender to work with her on reinstatement and modification." These objections construe *Aceves* too narrowly.

In *Aceves*, the plaintiff homeowner obtained an adjustable rate loan to purchase her residence. (*Aceves, supra,* 192 Cal.App.4th at p. 221.) Two years into the loan, she could not afford the monthly payments and filed for bankruptcy under chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701-784). (*Aceves,* at p. 221.) The homeowner intended to convert the chapter 7 proceeding to a chapter 13 proceeding (11 U.S.C. §§ 1301-1330) and to obtain financial help from her husband to cure the default and resume regular payments. (*Aceves,* at pp. 221, 223.) According to the allegations of her complaint, the homeowner "contacted the bank, which promised to work with her on a loan reinstatement and modification if she would forgo further bankruptcy proceedings." (*Id.* at p. 221.) In reliance on that promise, the homeowner did not convert to a chapter 13 proceeding and did not oppose the bank's motion to lift the bankruptcy stay. (*Ibid.*) After the bankruptcy court lifted the stay, the bank failed to work with the homeowner to reinstate and modify the loan, and instead completed the foreclosure. (*Id.* at pp. 221, 224.)

The trial court in *Aceves* sustained the bank's demurrer to the homeowner's cause of action for promissory estoppel, but the appellate court reversed, finding the alleged promise was "sufficiently concrete to be enforceable." (*Aceves, supra,* 192 Cal.App.4th at p. 222.) The appellate court explained: "[The bank] agreed to 'work with [the homeowner] on a mortgage reinstatement and loan modification' if she no longer pursued relief in the bankruptcy court. This is a clear and unambiguous promise. It indicates that [the bank] would not foreclose on

[the plaintiff's] home without first engaging in negotiations with her to reinstate and modify the loan on mutually agreeable terms." (*Id.* at p. 226.) The promise was sufficiently definite because no more was required to determine whether the promise had been breached: "[The plaintiff's] claim rests on whether [the bank] engaged in the promised negotiations. The bank either did or did not negotiate." (*Ibid.*)

The same analysis applies to the alleged promise in this case. Like the bank in *Aceves*, Defendants allegedly promised to "review Plaintiffs' [loan modification] package . . . and grant Plaintiffs a loan modification if Plaintiffs met Bank Defendants' criteria." Additionally, Defendants promised that the "foreclosure process would be suspended and no trustee's sale would take place" while Defendants conducted their review, and that they would not resume foreclosure proceedings or schedule a trustee's sale without "reasonable advance notice to Plaintiffs" that the modification request had been rejected. No more detail was needed to determine whether Defendants breached the promise. They either conducted the review, suspended the pending trustee's sale, and gave Plaintiffs advance notice that the foreclosure proceedings would resume, or they did not. (Cf. *Aceves, supra,* 192 Cal.App.4th at p. 226.)

Defendants contend the alleged promise was "insufficiently clear and unambiguous" because Plaintiffs did not identify "who would be reviewing [Plaintiffs] for a modification, or what was meant by the 'foreclosure process,' by 'being reviewed,' or 'being considered.' " The argument is inconsistent with the *Aceves* court's analysis and contrary to the rules governing a court's review of a complaint's allegations on a motion for judgment on the pleadings. As discussed, the *Aceves* court found the alleged

promise to " 'work with [the homeowner] on a mortgage reinstatement and loan modification' " sufficiently definite to support a promissory estoppel claim, without requiring further explanation of what the phrase " 'work with' " meant. (*Aceves, supra,* 192 Cal.App.4th at p. 226.) That conclusion is consistent with the rules governing a motion for judgment on the pleadings, which require courts to treat the "allegations of the complaint, including those that arise by reasonable inference as true, and [to] construe them liberally with a view to substantial justice." (*Umansky v. Urquhart* (1978) 84 Cal.App.3d 368, 370 (*Umansky*).) Reviewing Plaintiffs' allegations under these rules, we have no problem discerning what Plaintiffs meant by "review" and suspend the "foreclosure process." Plaintiffs meant, as was alleged in *Aceves*, that Defendants would not foreclose on the home without first determining whether Plaintiffs qualified for a modification and advising Plaintiffs of the determination.[3] (Cf. *Aceves,* at p. 226 [the allegation "indicates that [the bank] would not foreclose on [the plaintiff's] home without first engaging in negotiations with her to reinstate and modify the loan on mutually agreeable terms"].) The alleged promise was sufficiently definite to support a promissory estoppel claim.

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[3] Although we agree with Plaintiffs that they were not required to identify the bank representative who made the alleged promises, as the matter is one that "is or should be within [Defendants'] knowledge" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 794 (*West*)), we note that Plaintiffs' proposed second amended complaint did identify the employee by name.

b. *Reasonable, foreseeable, and detrimental reliance*

" 'Promissory estoppel applies whenever a "promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance" would result in an "injustice" if the promise were not enforced.' " (*Advanced Choices, supra,* 182 Cal.App.4th at pp. 1671-1672; *Aceves, supra,* 192 Cal.App.4th at p. 227.) "[A] party plaintiff's misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 54.) Mere "hopeful expectations cannot be equated with the necessary justifiable reliance." (*Id*. at p. 55; *Aceves,* at p. 227.) The plaintiff's reliance also must be detrimental, meaning the defendant's promise must "induce[ ] action or forbearance" that injures the plaintiff's interests. (*West, supra,* 214 Cal.App.4th at pp. 803-804.)

In reliance on Defendants' promise to suspend foreclosure proceedings, Plaintiffs allege they refrained from taking actions to postpone the foreclosure, such as seeking bankruptcy protection or injunctive relief, that, if taken, "would have allowed a loan modification to be concluded" before Defendants could sell their home. The trial court determined this allegation was insufficient to show reasonable reliance because neither protective measure was "reasonably foreseeable" to Defendants. Defendants make the same argument, acknowledging the "possibility of a bankruptcy filing [or litigation] exists for every borrower," but asserting these measures "cannot be, and should not be, 'reasonably expected' conduct" when a foreclosure is threatened. We disagree.

In *West*, the defendant bank promised the plaintiff homeowner that it would review her financial data to determine whether she qualified for a loan modification, and the bank assured the homeowner that no foreclosure sale was pending. (*West, supra,* 214 Cal.App.4th at pp. 788-790, 804.) Two days later, the bank sold her home at a trustee's sale. (*Id.* at p. 790.) In asserting a promissory estoppel claim based on the bank's promise, the plaintiff alleged merely that her " 'reliance was justified and reasonable.' " (*Id.* at p. 804.) The *West* court acknowledged the allegation was insufficient when read "in isolation," but concluded the complaint, when "read as a whole, [could] be reasonably interpreted to allege that [the plaintiff's] reliance on [the bank's] alleged misrepresentations caused [the plaintiff] not to take legal action to stop the trustee's sale." (*Ibid.*) Relying on other appellate authorities that had determined similar allegations were sufficient, the *West* court reversed the judgment on the promissory estoppel claim. (*Ibid.*; see *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 566 [homeowner adequately stated claim for promissory estoppel where she allegedly relinquished "the opportunity to use other remedies to save her home (such as restructuring her debt in bankruptcy)" in reliance on bank's promise to consider her for a loan modification]; see also *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 930 [allegation that homeowners declined to pursue "other means of avoiding foreclosure" sufficient to state promissory estoppel claim based on bank's promise to offer a permanent loan modification if homeowners made trial period plan payments].)

When read as a whole, the amended complaint's allegations are sufficient to find Defendants should have reasonably expected

Plaintiffs to forgo available legal processes to suspend the pending foreclosure, such as seeking bankruptcy protection or injunctive relief, in reliance on Defendants' promise to review their application for a loan modification. To begin, Plaintiffs allege they "informed Bank Defendants that they wanted to *avoid a foreclosure* and enter into a loan modification" after Defendants recorded a notice of default on the property. (Italics added.) Moreover, insofar as Defendants allegedly promised the "foreclosure process would be suspended" while they reviewed Plaintiffs' application, Defendants plainly understood the pending trustee's sale was a major consideration, and Defendants should have expected their promise to induce Plaintiffs not to pursue other means to suspend the foreclosure sale.

Defendants argue (and the trial court concluded) Plaintiffs' alleged forbearance could not have been reasonably expected because, unlike the plaintiff in *Aceves*, Plaintiffs had not petitioned for bankruptcy protection before approaching Defendants for a loan modification. (See *Aceves, supra,* 192 Cal.App.4th at p. 221.) The distinction makes no substantive difference at the pleading stage. As discussed, in determining whether Plaintiffs have adequately stated a claim for relief on a motion for judgment on the pleadings, we must liberally construe the complaint, accepting the truth of its allegations and all reasonable inferences that can be drawn from those allegations. (*Umansky, supra,* 84 Cal.App.3d at p. 370.)

Here, we can reasonably infer that Defendants knew bankruptcy was an option that Plaintiffs, like many other debtors, likely would pursue to halt the foreclosure, even if Plaintiffs never explicitly raised it in their discussions with Defendants. Indeed, the *Aceves* court highlighted this point,

emphasizing that " '[c]hapter 13's greatest significance for debtors is its use as a weapon to avoid foreclosure on their homes.' " (*Aceves, supra,* 192 Cal.App.4th at p. 228.) Filing a petition under chapter 11 of the Bankruptcy Code, like chapter 13, triggers an automatic stay against most creditor actions and affords a debtor the opportunity to cure a mortgage delinquency over time. (See 11 U.S.C. §§ 362, 1124(2); cf. 11 U.S.C. § 1322(b)(5).) In view of these well known protections, it is no stretch to infer that Defendants expected Plaintiffs would petition for bankruptcy, unless they promised to suspend the foreclosure proceedings while the modification application was under review.

Finally, Defendants argue the allegations are insufficient to establish detriment, because they maintain Plaintiffs cannot show a bankruptcy petition or litigation would have been successful in avoiding foreclosure. We disagree. Plaintiffs alleged these measures would have halted the foreclosure proceedings long enough to allow their modification application to be reviewed and ultimately approved before their home could be sold. Additionally, they alleged they would have been able to borrow sufficient funds from family members, friends, and business associates to bring the loan current in the event Defendants denied their modification application. We must accept these allegations as true at the pleading stage over Defendants' speculation that nothing could be done to save the home from foreclosure. (See *Aceves, supra,* 192 Cal.App.4th at p. 230 [rejecting bank's contention that plaintiff would not have been able to afford payments under bankruptcy plan, observing "the complaint alleged that, with the financial assistance of her husband, [plaintiff] could have saved her home under chapter

13"].) The trial court erred in dismissing the promissory estoppel claim.

3. *The Complaint Alleges Sufficient Facts to State a Cause of Action for Dual Tracking in Violation of the HBOR*

The trial court sustained Defendants' demurrer to the HBOR claim, without leave to amend, on the ground that Plaintiffs failed to allege facts to "establish any particular violation of any particular provision of the Homeowner Bill of Rights." Plaintiffs contend the court abused its discretion when it denied them leave to amend the claim, and they argue they can allege sufficient facts to state a claim for dual tracking in violation of former section 2923.6, subdivision (c).[4] We agree.

The HBOR "was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' [Citation.] Among other things,

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[4] We consider the version of section 2923.6 that was in effect in March 2013, when the alleged dual tracking occurred. (See Stats. 2012, ch. 87, § 7, eff. Jan. 1, 2013.) That section was amended effective January 1, 2018, to remove the dual tracking prohibition, which was simultaneously moved to former section 2924.11, subdivision (a). (See Stats. 2012, ch. 86, § 8, eff. Jan. 1, 2018; see also former § 2924.11, subd. (g).) Effective January 1, 2019, section 2923.6 was amended again to prohibit dual tracking under subdivision (c), with the added requirement that the borrower must submit a complete loan modification application "at least five business days before a scheduled foreclosure sale." (§ 2923.6, subd. (c); see Stats. 2018, ch. 404, § 7, eff. Jan. 1, 2019.)

HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

During the relevant period, former section 2923.6, subdivision (c) provided, "[i]f a borrower submits a complete application for a first lien loan modification," the foreclosing entity "shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending," unless the borrower is provided with a written determination regarding her application and the time for an appeal (30 days) has expired. (Former § 2923.6, subds. (c) & (c)(1); see also former § 2923.6, subd. (d).)

Plaintiffs allege they submitted "a complete loan modification package and all documentation [Defendants] required for a loan modification" on March 12, 2013. Notwithstanding the prohibition against dual tracking then in effect under former section 2923.6, subdivision (c), Plaintiffs allege Defendants conducted a trustee's sale of their home on March 20, 2013. These allegations are sufficient to state a claim for dual tracking in violation of the HBOR.

On appeal, Defendants argue Plaintiffs' claim is legally barred because, according to a document attached to Defendants' request for judicial notice in support of their motion for judgment on the pleadings, Plaintiffs received a loan modification from their former lender in October 2008. Based on the October 2008 loan modification agreement, Defendants maintain they had no obligation to evaluate Plaintiffs' application for a second loan modification unless Plaintiffs showed they had experienced a "material change in [their] financial circumstances." (Former

§ 2923.6, subd. (g).) Defendants also argue they were not required to suspend foreclosure proceedings because Plaintiffs defaulted on their obligations under the prior loan modification. (See former § 2923.6, subd. (c)(3).)

Because Defendants did not assert these grounds in their demurrer to the HBOR claim, we decline to consider them as a basis for denying leave to amend at this time. Determining whether Plaintiffs experienced a material change in their financial circumstances or whether they submitted all required documentation to have their application evaluated may implicate factual and evidentiary issues that are not appropriate for resolution at the pleading stage. As for whether Plaintiffs' default gave Defendants license to engage in dual tracking under former section 2923.6, subdivision (c)(3), because neither party has briefed the statutory construction and legislative intent questions that are implicated, we conclude Plaintiffs should be granted leave to amend to restate their HBOR claim so that the record on this issue can be more fully developed. (See *Siegel v. American Savings & Loan Assn.* (1989) 210 Cal.App.3d 953, 965-966 [where defendants failed to raise federal statute in their demurrer and "merely cite[d] [statute] without offering any case authority as to the meaning of the section," appellate court declined to determine whether statute preempted plaintiff's state law claim].)

DISPOSITION

The judgment is reversed, the order granting the motion for judgment on the pleadings with respect to the promissory estoppel claim is vacated, and the trial court is directed on remand to grant Plaintiffs leave to amend the complaint to

state a claim for violation of the HBOR. Plaintiffs Sholem Perl and Leah Perl are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.